DRN-5091874

The complaint

Mr H's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

Mr H and his wife purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 2 April 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,050 fractional points at a cost of £13,898 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr H and his wife more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr H paid for their Fractional Club membership by taking finance of £13,898 from the Lender in Mr H's name (the 'Credit Agreement'). This means that Mr H is the eligible complainant and for simplicity in the remainder of this decision I will refer to him as the sole purchaser.

Mr H – using a professional representative (the 'PR') – wrote to the Lender on 29 August 2017 (the 'Letter of Complaint'). It read, in full:

"*Our clients named above with to make a Section 75 claim under the Consumer Credit Act of 1974 against [the Supplier] (all documents and Letter of Authorisation enclosed).*

They bought into [the Supplier] on a Fractional Points system. They were told they could pass it on to their children and that our clients financial liability would end in nineteen years. They have never been able to use these points due to lack of availability and [the Supplier] say they will reclaim these points as they have never used them (lack of availability)!!

They were falsely sold the points as an investment and they are stating lack of availability, lack of exclusivity, perpetuity clause never explained. There was no financial projection, huge increases in maintenance fees not explained and details on product inheritance not explained accurately. At the initial meeting, there was a very hard sell, accompanied by lots of alcohol, and they left the meeting feeling very pressurised.

They are extremely disappointed and saddened that they have spent so much money and are still unable to go on holiday.

Our clients are both suffering from high blood pressure and stress and this situation is not helping matters."

The Lender dealt with Mr H's concerns as a complaint and issued its final response letter on 6 December 2017, rejecting it on every ground. It treated Mr H's complaint as one made

under various provisions of the CCA.

Mr H then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits. They too considered the complaint through the lens of the CCA.

Mr H disagreed with the Investigator's assessment and asked for an Ombudsman's decision.

Another ombudsman issued a provisional decision, but as he has moved on the case has been passed to me and I issued a second provisional decision to allow both parties to comment if they so wished. I took into account the responses to my colleague's provisional decision.

Having considered everything, I think this is a complaint about the following things and neither party has disagreed:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.

2. A breach of contract by the Supplier giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.

(1) Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

Mr H says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told him he could pass on the fractional points to his children and his financial liability would end in 19 years when that was not true.

2. told him that Fractional Club membership was an "investment" when that was not true because it was worthless.

3. failed to tell him about the huge increase in maintenance fees.

4. told him that the Supplier's holiday resorts were exclusive to its members when that was not true.

Mr H says that he has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr H.

(2) Section 75 of the CCA: the Supplier's breach of contract

1. Mr H says that the Supplier breached the Purchase Agreement because there is no guarantee that he will receive his share of the net sale proceeds of the Allocated Property.

2. Mr H also says that he found it difficult to book the holidays he wanted, when he wanted.

As a result of the above, Mr H says that he has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr H.

(3) Section 140A of the CCA: the Lender's participation in an unfair credit relationship The Letter of Complaint does not refer directly to Section 140A, but the complaint has to date been considered as one that the Lender was a party to an unfair debtor-creditor relationship

for the following reasons:

1. Fractional Club membership was marketed and sold to him as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').

2. The contractual terms setting out (i) the duration of his Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of his membership were unfair contract terms under the Unfair Terms in Consumer Contracts

Regulations 1999 (the 'UTCCR').

3. He was pressured into purchasing Fractional Club membership by the Supplier.

4. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.

5. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- The CCA (including Section 75 and Sections 140A-140C)
- The law on misrepresentation.
- The Timeshare Regulations.
- The UTCCR.
- The CPUT Regulations.
- Case law on Section 140A of the CCA – including, in particular:
- The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).
- Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast') Patel v Patel [2009] EWHC 3264 (QB) ('Patel').
- The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').
- Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').
- Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').

- R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ('Shawbrook & BPF v FOS').

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But they represented a minimum standard. And as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

I issued a provisional decision as follows:

"*I do not currently think this complaint should be upheld. But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.*

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr H could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr H at the Time of Sale, the Lender is also liable.

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the implied suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr H was told that he was buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr H's share in the Allocated Property was clearly the purchase of a share of the

net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that he acquired such an interest.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr H has concerns about the way in which his Fractional Club membership was sold, he

has not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons he alleges.

Alongside this complaint, Mr H provided a number of other documents that he completed, seemingly in anticipation of making a complaint to the Lender. The first of these was completed on 9 April 2017, so before the Letter of Complaint, but doesn't mention any of the allegations set out in that letter. I find it hard to understand why, if Mr H had been told things at the Time of Sale that tuned out not to be true, those weren't included in his first reasons to complain.

On 3 June 2017, Mr H signed a separate document which mentioned some of the other matters complained of, namely that they had been misled about the exclusivity of the membership and that it was an investment, but no specific detail of what they'd been told, and why that was untrue, was provided.

Finally, in response to our Investigator, the PR provided an unsigned statement that it said all of its clients (not just Mr H) had agreed was a true reflection of the sales process. But as this statement appears to be both generic and not actually signed by Mr H, I place no weight whatsoever on it.

Turning to the allegations, on balance, I'm not persuaded that by the allegation that the Supplier told the Consumer that his liability would end in 19 years and he could pass it on to his children. I appreciate Mr H may recall the sales pitch promising this, but it is at odds with the sales process this service has seen. The certificate of ownership shows that the fractional property will be registered for sale after 31 December 2030 and not that the membership would terminate on a specific date in the future.

On the issue of management fees these are detailed in the Information Statement and at the time the Letter of Claim was submitted Shawbrook has explained that the fees were £894 in 2014 and had increased to £1,000 four years later. So even if Mr H was told something about the management fees and how they might increase (and I make no such finding), I can't see that they've increased at an unreasonable rate.

Nor do I consider that Mr H was told that the resorts would be 'exclusive'1. Mr H simply hasn't provided any details of what he was told, nor why that turned out to be untrue.

Members are able to invite guests to stay and that of itself indicates that the reports are not limited to use by members only.

As for the claim that the product was sold as an investment I will address in more detail later, however if he were to have been told that I do not think it would have been untrue.

What's more, as there's nothing else on file that persuades there were any false statements of existing fact made to Mr H by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons he alleges.

For these reasons, therefore, I do not think the Lender is liable to pay Mr H any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

Section 75 of the CCA: the Supplier's breach of contract

I've already summarised how Section 75 of the CCA works and why it gives [Consumer] a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to

say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

Mr H says that he could not holiday where and when he wanted to – which, on my reading of the complaint, suggests that he considers that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr H states that the availability of holidays was/is subject to demand. It also looks like he made use of his fractional points to holiday on two occasions between 2013 and 2017 and cancelled a further three holidays. I accept that he may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Mr H also says that the Supplier breached the Purchase Agreement because there is no guarantee that he will receive his share of the net sale proceeds of the Allocated Property. I understand that he is saying that he fears that, when the time comes for the Allocated Property to be sold, he will not receive his share of the sales proceeds. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr H any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

Section 140A of the CCA: did the Lender participate in an unfair credit relationship?

I have already explained why I am not persuaded that the contract entered into by Mr H was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr H also implies that the credit relationship between him and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that he has concerns about. It is those concerns that I explore here.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr H and the Lender was unfair.

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances.

And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]". And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of [Consumer's] membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in Plevin, at paragraph 31:

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

And this was recognised by Mrs Justice Collins Rice in Shawbrook & BPF v FOS at paragraph 135:

"By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer".

In the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."2

So, the Supplier is deemed to be Lender's statutory agent for the purpose of the pre-contractual negotiations.

What's more, the scope of that responsibility extends to both acts and omissions by the Supplier as the Supreme Court in Plevin made clear when it referred to 'acts or omissions' when discussing Section 56. And as Section 56(3)(b) says that an applicable agreement can't try to relieve a person from liability for 'acts or omissions' of any person acting as, or on behalf of, a negotiator, it must follow that the reference to 'omissions' would only be necessary because they can be attributed to the creditor under Section 56.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in Plevin (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in Plevin that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

I have considered the entirety of the credit relationship between Mr H and the Lender along with all of the circumstances of the complaint and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and

in carrying out my analysis, I have looked at:

2 The Court of Appeal's decision in Scotland was recently followed in Smith.

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; and

2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;

3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;

4. The inherent probabilities of the sale given its circumstances.

I have then considered the impact of those on the fairness of the credit relationship between Mr H and the Lender.

The Supplier's sales & marketing practices at the Time of Sale

Mr H's complaint about the Lender being party to an unfair credit relationship was also made for several reasons, all of which I set out at the start of this decision.

They include the allegation that the Supplier misled Mr H and carried on unfair commercial

practices which were prohibited under the CPUT Regulations for the same reasons he gave for his Section 75 claim for misrepresentation. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

Mr H says that he was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that he may have felt weary after a sales process that went on for a long time. But he says little about what was said and/or done by the Supplier during his sales presentation that made him feel as if he had no choice but to purchase Fractional Club membership when he simply did not want to. He was also given a 14-day cooling off period and he has not provided a credible explanation for why he did not cancel his membership during that time. Shawbrook says that Mr H made a previous purchase which he cancelled with the 14 days cooling off period.

And with all of that being the case, there is insufficient evidence to demonstrate that Mr H made the decision to purchase Fractional Club membership because his ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr H's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why he says his credit relationship with the Lender was unfair to him. And that's the suggestion that Fractional Club membership was marketed and sold to him as an investment in breach of prohibition against selling timeshares in that way.

Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

The Lender does not dispute, and I am satisfied, that Mr H's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mr H's share in the Allocated Property clearly, in my view, constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club.

They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr H as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr H, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr H as an investment.

With that said, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And while that was not alleged by either Mr H nor their PR when they first complained about a credit relationship with the Lender that was unfair to them, I accept that it's possible that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

But, having considered everything, I don't think I need to make a firm finding on that point. I say that because, for the reasons I'll come on to, I don't think there was an unfair debtor-creditor relationship even if Fractional Club membership was sold as an investment.

Was the credit relationship between the Lender and Mr H rendered unfair?

As the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court may make an order if it determines that the relationship is unfair to the debtor. […]

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr H and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mr H, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) lead him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But here, Mr H did describe being told by the Supplier that he was purchasing an investment, but does not add any detail as to what he was told. At no point did he say or suggest that the Supplier led him to believe that his Fractional Club membership would lead to a financial gain (i.e., a profit). Further, when he first wrote down the reasons he was unhappy with Fractional Club membership in April 2017, he made no mention of being told it was an investment – something I would have expected him to have said if he had purchased membership thinking it was a way of making a profit.

So, while PR now argues that the Supplier marketed and sold Fractional Club membership to Mr H as an investment, in light of the more recent generic witness statement following the outcome of Shawbrook & BPF v FOS, I don't recognise that assertion in his initial recollections of the sale.

Indeed, Mr H's initial recollections and the Letter of Complaint were put together much closer to the Time of Sale and are, in my view, better evidence of what he remembers of the sales process at that time and why he was unhappy with it than the more recent generic statement very recent recollections.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr H's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests he would have pressed ahead with his purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr H and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

The provision of information by the Supplier at the Time of Sale

Mr H complains that the end date was not clear cut, there was no guarantee of the sales proceeds, the contract unfairly allows increases in maintenance fees. He also says that the quality was variable and he was promised priority. He says he was also told he was acquiring an investment.

Before I consider whether the Supplier was in breach of anything, it is important to note that I must consider what real-world consequences, in terms of harm or prejudice to Mr H which have flowed from the alleged breach(es), because those consequences are relevant to assessment of unfairness under section 140A. For example, the judge attached importance to the question of how an unfair term had been operated in practice in Link Financial v

Wilson [2014] EWHC 252 (Ch) at [46].

That said I am unable to identify and prejudice or unfairness the alleged breaches have led to in the complaint.

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr H when he purchased membership of the Fractional Club at the Time of Sale. But he and PR suggest that the Supplier failed to provide them with all of the information he needed to make an informed decision.

Failing to provide information or there being unfair terms are things that could have been breaches of the Timeshare Regulations or UTCCR.

One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the CRA being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I've said before, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of the Timeshare Regulations, the CPUT Regulations] and the CRA are likely to have prejudiced Mr H's purchasing decision at the Time of Sale and rendered his credit relationship with the Lender unfair to him for the purposes of section 140A of the CCA.

And I say this because:

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mr H was unfair to him because of an information failing by the Supplier, I'm not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr H was unfair to him for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis."

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Neither party has responded to my provisional decision and so I have been given no reason to alter it. As such, it stands and I do not consider the complaint should be upheld.

My final decision

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr H's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement that was unfair to him for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate him. In conclusion I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 18 November 2024.

Ivor Graham
Ombudsman